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No. - .

Supreme Court, U.S.
FILED
DEC 17 1987
JOSEPH F. SPANIOL, JR.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1987.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,
PETITIONER,

v.

F. WILLIAM GRAF,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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December 17, 1987

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Questions Presented.

May an individual shareholder or corporate officer be held personally liable as a statutory "employer" for a corporation's withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 based on the "economic reality" test applicable under the Fair Labor Standards Act's definition of "employer"?

List of Parties.

The parties to the proceedings below were the petitioner, the New England Teamsters and Trucking Industry Pension Fund, and the respondent, F. William Graf.

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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1987.

HELEN DEBRECENI, FUND MANAGER OF THE
NEW ENGLAND TEAMSTERS AND
TRUCKING INDUSTRY PENSION FUND,
PETITIONER,

v.

F. WILLIAM GRAF,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The Petitioner New England Teamsters and Trucking Industry Pension Fund respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on September 18, 1987.

Opinons Below.

The opinion and judgment of the Court of Appeals for the First Circuit have been reported at 828 F.2d 877, and are reprinted in the appendix hereto at page 1a *infra*.

The opinion and judgment of the United States District Court for the District of Massachusetts (Mazzone, D.J.) have not been reported, and are reprinted in the appendix hereto at page 10a *infra*.

Jurisdiction.

The United States Court of Appeals for the First Circuit entered judgment on September 18, 1987. The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1254(1).

Applicable Statutory Provisions.

The instant petition raises the question of the meaning of the term "employer" as that word is used in the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub.L. 96-364, *codified at* 29 U.S.C. §§ 1381 *et seq.*, *amending* Employee Retirement Income Security Act of 1974 ("ERISA"), *codified at* 29 U.S.C. §§ 1001 *et seq.*, for purposes of an action to collect so-called "withdrawal liability." Specifically, the issue is whether the definition of "employer" in ERISA, 29 U.S.C. § 1002(5) and (9), which is substantially the same as that in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(a) and (d), applies to "employers" under MPPAA, so as to hold individual shareholders and corporate officers personally liable for withdrawal liability in appropriate circumstances.

The texts of 29 U.S.C § 203(a) and (d), 29 U.S.C. § 1002(5) and (9), 29 U.S.C. § 1381 and 29 U.S.C. § 1451 are set out in the Appendix of this petition.

Statement of the Case.

A. *Statement of Prior Proceedings.*

The instant petition arises out of an opinion and judgment entered by the United States Court of Appeals for the First Circuit, affirming a judgment of the United States District Court for the District of Massachusetts (Mazzone, D.J.) dismissing a complaint filed on behalf of the New England Teamsters and Trucking Industry Pension Fund (hereinafter, "the Petitioner"), pursuant to and under the terms of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, *codified at* 29 U.S.C. §§ 1381 *et seq.*, *amending* Employee Retirement Income Security Act of 1974 ("ERISA"), *codified at* 29 U.S.C. §§ 1001 *et seq.*, wherein the Petitioner sought to collect so-called "withdrawal liability" from F. William Graf (hereinafter, "the Respondent"), Graf Bros. Leasing, Inc., and Downeast Dispatch, Inc., which liability was attributable to the participation of the then and now-bankrupt Graf Bros., Inc. in the Petitioner Pension Fund.[1]

On January 16, 1986, all defendants filed a collective motion for summary judgment. By Memorandum and Order dated April 2, 1986, the district court, Mazzone, D.J., denied the motion as to each defendant. *See* Memorandum and Order, page 21a *infra*. Specifically, as regards Respondent, the court determined that if Mr. Graf " 'had control of [Graf Bros.'] operations and he managed and directed all its financial, production

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[1] The Pension Fund sought to establish liability against Graf Bros. Leasing, Inc. and Downeast Dispatch, Inc. on a "control group" theory, *see Pension Benefit Gurarantv Corporation* v. *Ouimet Corp.*, 630 F.2d 4 (1st Cir. 1980), and *see* 29 U.S. C. § 1301(b), while it sought to invoke an "economic reality" standard to establish the personal liability of F. William Graf. *See, e.g., Massachusetts State Carpenters Pension Fund* v. *Atlantic Diving Co., Inc.*, 635 F.Supp. 9 (D. Mass. 1984); *Alman* v. *Seryall Mfg. Co.*, 6 Employee Benefit Cases (EBC) 2031 (D. Mass. 1984).

and all other business activities' and in particular 'acted on behalf of [Graf Bros.] in all matters having to do with the benefit plan[s]'," he would be personally liable for the withdrawal liability assessed.[2] *See* pages 25a-26a *infra*.

With reference to Graf Bros. Leasing and Downeast Dispatch, the court determined that Graf Bros., Graf Bros. Leasing and Downeast Dispatch would have qualified as members of a commonly controlled group and could have been treated as one employer for the purposes of MPPAA before, but not after, the stock of these companies was shuffled in March 1981.[3] The court, however, left for the trial the issue of whether the stock shuffling was done to avoid withdrawal liability in which case the stock transaction would be voided for purposes of MPPAA.[4]

In October 1986, the parties below stipulated to the dismissal of Graf Bros. Leasing and Downeast Dispatch as defendants, and on January 15, 1987 the instant case proceeded to trial solely against Respondent. The evidence at trial consisted of "a 12-page stipulation of the parties, the deposition testimony of H. Terence Lyons, a financial advisor, and Peter L. Murray, an attorney who had previously represented Respondent, the prior testimony of Respondent in the bankruptcy proceedings involving Graf Bros., Inc., the in-court testimony of Daniel A. Graf, nephew of Respondent, and various exhibits submitted by the parties." *See* page 11a *infra*.

In its January 23, 1987 *Opinion*, the district court abandoned its earlier holding that an "economic reality" standard applied to actions brought to collect withdrawal liability. Instead the court held that "an individual may be held personally liable

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[2] Quoting *Alman* v. *Servall Mfg. Co.*, 6 EBC 2031 (D. Mass. 1984).

[3] *See* 29 U.S.C. § 1301(b) and 26 U.S.C. § 414(c).

[4] *See* 29 U.S.C. § 1392(c) ("If the principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction").

for a corporation's withdrawal payments [only] if the circumstances require piercing the corporate veil under traditional common law principles." *See* page 18a *infra*. Since the Petitioner had acknowledged that there was insufficient basis for piercing the corporate veil under traditional common law principles, the court entered judgment for Respondent.

The Petitioner took a timely appeal from that judgment. As stated by the First Circuit, the issue on appeal was as follows:

> This case presents the question whether a corporate shareholder or officer may be held personally liable for the withdrawal liability mandated by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1381 *et seq.*, by the application of an "economic reality" test similar to that used in cases decided under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206 [*sic*], *see Donovan* v. *Agnew*, 712 F.2d 1509 (1st Cir. 1983), or whether the standard should be the more stringent test generally required to "pierce to the corporate veil." *See e.g.*, *Alman* v. *Danin*, 801 F.2d 1 (1st Cir. 1986).

Pages 2a-3a *infra*, 828 F.2d at 878.

In this regard, Petitioner contended before the court of appeals that Respondent should be held to be an "employer" under the following rationale:

> 1. Under the Fair Labor Standards Act ("FLSA"), the term "employer" had been defined expansively by the federal courts prior to the enactment of ERISA to include shareholders and corporate officers who were found to be in operational control of their corporations based on the "economic reality" of their businesses.

2. Congress, in enacting ERISA, considered pension benefits to be a form of employee compensation and intended to design a bill in accord with the purposes of FLSA and adopted a definition of the term "employer" in ERISA, at 29 U.S.C. § 1002(5) and (9), which is substantially identical to that contained in FLSA, thereby including in the ERISA definition of the term "employer" shareholders and corporate officers with operational control under the "economic reality" test.

3. Congress, in enacting MPPAA and thereby amending Titles I and IV of ERISA, intended the same definition of "employer" to be controlling, for purposes of collecting withdrawal liability under Title IV, as is controlling for purposes of collecting delinquent pension contributions under Title I.

The court of appeals, however, rejected Petitioner's contentions, holding that corporate shareholders and officers are not "employers" responsible for the withdrawal liability of their corporations based on the FLSA definitional standards. *See* pages 6a-7a *infra,* 828 F.2d at 880. In so holding, the court first rejected the Petitioner's contention that Congress intended that the Title I definition of the term "employer" be applicable under Title IV. The court then held that the common law "principle of limited liability for corporate debts is longstanding enough to be considered a background norm," *id.*; that "MPPAA does not on its face indicate any intention to treat corporate debts for withdrawal liability different from any other corporate debts", *id.*; and that, therefore, a pension plan had to establish facts sufficient to warrant "piercing of the corporate veil" under applicable common law in order to hold controlling shareholders and officers personally liable for pension withdrawal liability. *See* page 5a *infra,* 828 F.2d at 880.

B. *Factual Background.*

Graf Bros. was an over-the-road trucking business incorporated by Respondent and Henry Graf, Jr., in 1951. Upon the death of Henry Graf in 1965, Respondent became the majority stockholder — owning at all times over eighty (80) percent of the stock.

From prior to 1970 to December 31, 1981, Graf Bros. was a contributor to the Petitioner Pension Fund. During this period Respondent executed all of the relevant collective bargaining agreements as well as the operative fund documents. In addition, at least from 1979 through the end of December 1981, Respondent maintained complete control of the day-to-day operation of Graf Bros. During this same period, Respondent was aware of the deteriorating financial condition of Graf Bros., and in late 1979 he retained the service of then Pension Fund Trustee, H. Terence Lyons, to assist him in overcoming the company's financial problems. Soon after being hired, Lyons informed Respondent of the poor financial condition of Graf Bros. and advised him that the company had to be sold, merged, recapitalized or restructured in order to survive. Indeed, Lyons himself discussed the possibility of purchasing Graf Bros. However, Respondent steadfastly resisted any and all attempts to sell, merge or restructure the company.

Prior to March 11, 1981, the Internal Revenue Service notified Respondent that Graf Bros. would be closed unless the company's delinquent withholding taxes were paid. Using his personal funds as well as the mortgage money relating to a parcel of improved land that had been transferred, on the sole instruction of Respondent, from Graf Realty, Inc. to Graf Bros., Respondent paid a portion of the company's tax delinquency.

Throughout the remainder of 1981, Graf Bros. continually was delinquent in paying its debts, and Respondent personally would decide which, whether and when debts would be paid.

In this process, Respondent chose not to pay the large and accumulating liabilities owed by Graf Bros. to the Petitioner Pension Fund. In the late winter of 1981, the First National Bank of Boston, Graf Bros.' primary lending institution, had begun to pressure the company for payment of its outstanding loans to the bank. By the fall of 1981, the First National Bank of Boston began taking steps to collect its outstanding loans to the company. As a result of the bank's actions and the deteriorating financial status of the company, Respondent, in October 1981, personally made a decision to seek protection for Graf Bros. under Chapter 11 of the Bankruptcy Code. While under Chapter 11 protection, Respondent ran Graf Bros. as a debtor in possession.

Graf Bros. ceased operations on December 31, 1981, thereby withdrawing from the Petitioner Pension Fund. Following the company's withdrawal from the Petitioner Pension Fund, the Petitioner issued a withdrawal liability demand of $1,319,949, which demand subsequently was adjusted downward to $1,195,229. In March 1982, the Chapter 11 reorganization proceedings were converted to a Chapter 7 liquidation and, thereafter, the Petitioner received $137,429.85 as full payment on its delinquent contribution claims, but only $175,000 toward the total withdrawal liability of $1,195,229. The balance still owing to Petitioner is $1,020,229.

Reasons for Granting the Writ.

The decision of the First Circuit should be reviewed first because it reflects and sharpens a conflict between two circuits on one hand and a district court from a third circuit on the other, regarding the construction of a comprehensive federal remedial enactment. The construction of the statutory language

in question could affect the availability of pension benefits for potentially millions of Americans, will involve enormous sums of money (the instant case concerns over $1,000,000) and could have a potentially serious impact on the continued viability of the Pension Benefit Guaranty Corporation.

Second, Petitioner believes that the decision severely encroaches on an important national policy, repeatedly expressed by Congress and confirmed uniformly by federal courts: the policy that the pension benefits earned by Americans must be protected by a comprehensive and uniformly applicable federal regulatory scheme to assure that all Americans are equally enabled to reap in their retirement years the recompense their working lives have paid for.

I. The Decision of the First Circuit That a Shareholder or Corporate Officer Cannot Be Held Personally Liable for the MPPAA Withdrawal Liability Conflicts with a Decision of the United States District Court for the Eastern District of Pennsylvania on an Important Federal Statutory Question.

To date, only two courts of appeal have addressed squarely the precise issue presented in this petition. In this regard, the First Circuit herein and the District of Columbia Circuit have both held that "traditional common law principles" of corporate law, i.e., state law, determine the personal liability of shareholders and corporate officers under Title IV of ERISA. *See Connors* v. *P & M Coal,* 801 F.2d 1373 (D.C. Cir. 1986). However, the United States District Court for the Eastern District of Pennsylvania has held that "the proper definition of an 'employer' for the purposes of MPPAA is contained in § 1002(b) [*sic*]," see *Central Pennsylvania Teamsters Pension Fund* v. *Service Group, Inc.*, 645 F.Supp. 966, 997-998 (E.D.

Pa. 1985), and construed the § 1002(5) definition as essentially identical to the "economic reality" test applied under FLSA. *See id.* at 998.

While this case concededly does not present a direct conflict between two circuit courts of appeal, it does present a conflict between two circuit courts and a district court on a matter of critical importance to the construction and enforcement of an expansive federal remedial statute. The Petitioner submits that these differing judicial responses create an untenable incongruity: pension plan trustees in the First and District of Columbia Circuits are now substantially less likely than those in the Eastern District of Pennsylvania to establish successfully the personal liability of shareholders and corporate officers for withdrawal liability despite the existence of one uniform federal statute defining their rights and responsibilities. For the same reason, the Pension Benefit Guaranty Corporation is substantially more likely to be forced to shoulder the burden of protecting the vested benefits of plan participants in the First and District of Columbia Circuits than in the Eastern District of Pennsylvania, again despite the existence of one uniform federal remedial statute.

Petitioner submits that this Court has established precedent for granting *certiorari* based on a conflict between a circuit court and a district court, or among several district courts, where the conflict involves interpretation of an important federal statute enforcing or implicating an important federal policy. *See, e.g., Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477 n.3 (1981); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 n.14 (1981); *Hefron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 646 n.9 (1981); *Massachusetts* v. *United States*, 435 U.S. 444, 453 (1978); *Calhoon* v. *Harvey*, 379 U.S. 134 (1964); *United States* v. *Constantine*, 296 U.S. 287, 290 (1935).

As this Court noted in *United States* v. *Constantine, supra,* the combination of an important unsettled question of federal law with the likelihood of recurring litigation and conflicting results in the district courts can justify the exercise of *certiorari* jurisdiction even absent direct circuit-to-circuit conflict:

> In its petitition for certiorari the United States, though admitting the absence of a conflicting decision by the Circuit Court of Appeals of any other circuit, called attention to diverse decisions in the district courts, to the many other cases pending in which action is awaiting authoritative settlement of the question presented herein, to the large amount of money involved, and to the number of persons whose liability will remain uncertain until the dispute is finally settled. The question thus assumes the importance required by Rule 38 and the writ issued accordingly.

296 U.S. at 290 (footnotes omitted).

In addition, in *Hefron, supra,* this Court granted *certiorari* "in light of the important constitutional issues presented and the conflicting results reached in similar cases in *various lower courts,*" none of which involved circuit-to-circuit conflict. *See* 452 U.S. at 646 (emphasis added). Petitioner believes that an important federal statutory question is presented here, as discussed *infra,* and Petitioner believes that this conflict heightens and illuminates the significance of the statutory issue and the pressing need for this Court to lay down a uniform, national rule.

Further, at least the possibility of a conflict is suggested by the differing views of the First and Seventh Circuits regarding the construction in general of ERISA's Titles I and IV. In this

regard, the Seventh Circuit has held that the Title I definition of "non-forfeitable" is controlling for all uses of the same word in Title IV, where Title IV is silent as to the definition of the term. *See Nachman* v. *PBGC*, 592 F.2d 947, 953 (7th Cir. 1979). In reaching that result, the Seventh Circuit applied the axiom of statutory construction which says: "an earlier specific definition may properly color a subsequent use of the same words without re-definition". *Nachman, supra*, 592 F.2d at 953 n.6, *quoting Nachman Corp.* v. *PBGC*, 436 F.Supp. 1334, 1338 (N.D. Ill. 1977). *See also Kent Manufacturing Corp.* v. *C.I.R.*, 288 F.2d 812 (4th Cir. 1961).

The First Circuit herein rejected the application to ERISA of this statutory construction axiom. Interestingly, in so ruling, the First Circuit quoted and relied upon a partial and incomplete quotation of a footnote from the Court's affirming decision in *Nachman*. *See Nachman Corp.* v. *PBGC*, 446 U.S. 359, 370 (1980). The part of the footnote quoted by the First Circuit below is as follows: "This specific incorporation suggests that Title I definitions do not apply elsewhere in the Act of their own force. . . ." *See* page 6a *infra*, 828 F.2d at 880 n.1. However, the full quotation of the footnote, in the context of this Court's affirmance of the Seventh Circuit, belies the First Circuit's reliance on same. In this regard, the Court in total stated the following:

> This specific incorporation suggests that Title I definitions do not apply elsewhere in the Act of their own force, *though they may otherwise reflect the meaning of the terms defined as used in other Titles*.

446 U.S. at 370 n.14 (emphasis added).

In addition, this Court went on in *Nachman* to apply the Title I definition of "vested" to uses of the word in Title IV.

See 446 U.S. at 377 n.26. Thus, it appears that the First Circuit erred in not applying the method of statutory construction described *supra* to build a bridge between the Title I and Title IV definitions of "employer", particularly where this method of construction has been sanctioned expressly by this Court in the context of construing ERISA. *See id.*[5]

Finally, as this Court observed in *United States* v. *Constantine, supra,* one factor that oftens plays a role in sharpening a conflict sufficiently to make an issue worthy of an exercise of *certiorari* jurisdiction is the question of whether "a large amount of money" is involved in the dispute. *See* 296 U.S. at 290. As noted *supra,* the amount in dispute in this case is in excess of $1,000,000, and the amount that could be lost by retirees in the form of unfunded pension benefits in the future certainly far exceeds that figure.

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[5] In support of its determination that "defining [the] meaning [of the term "employer"] for [Title IV] is up to the courts", page 6a *infra,* 828 F.2d at 880, the First Circuit cited to its own decision in *Robinson* v. *C.I.R.*, 805 F.2d 38, 40 (1st Cir. 1986). *See* page 6a *infra,* 828 F.2d at 880. Such reliance is inapplicable to this case, however, because in the legislative history of the statute construed in *Robinson,* 26 U.S.C. § 83, there is express support for judicial exercises in statutory definition to fill gaps in statutory coverage: "in other cases the question of whether there is a substantial risk of forfeiture defends upon the facts and circumstances." *See* H.R.Rep. No. 91-413 (Pt. 1), 92nd Cong., 1st Sess. 62, 88 (1969-3 Con. Bull. 200, 225). Thus, in construing § 83 of the IRS Code, courts were directed overtly in the legislative materials to make law regarding definitions on a case-by-case basis. In contrast, all of the legislative history of ERISA and of MPPAA points to the opposite directive: one set of statutory definitions should apply to *all* aspects of pension regulation, with certain narrow exceptions spelled out in the text of the Act itself. *See, e.g.*, 29 U.S.C. § 1362(e) (1) (B).

II. The First Circuit's Reliance on "Traditional Common Law Principles of Corporate Law" Conflicts with the Important Congressional Policy of Uniformity in the Administration and Enforcement of Federal Pension Law and Thus Raises an Unresolved Federal Statutory Question of Great Significance to Multiemployer Pension Funds in All Fifty States as Well as to the PBGC.

This Court has noted that ERISA is a "comprehensive and reticulated statute." *PBGC* v. *R.A. Gray & Co.*, 465 U.S. 717, 720 (1984), *quoting Nachman Corp.* v. *PBGC*, 446 U.S. 359, 361-362 (1980); *see also Connolly* v. *PBGC*, 475 U.S. 211 (1986). This Court also has noted that "Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans." *Connolly* v. *PBGC*, 475 U.S. at 227-228. Since it is obvious that this "overall statutory scheme" is a federal one, any incursion of "traditional" state common law principles of corporate law into this federal statutory scheme raises substantial implications of federalism and choice of law issues, and undercuts the primary rationale of Congress in enacting both ERISA and MPPAA, i.e., the safeguarding of the anticipated pension benefits of all American workers by the enactment of "ERISA in 1974 to provide comprehensive regulation" in this field. *Id.* at 214.

Specifically, ERISA was intended to establish a regulatory scheme that was "uniform" in two senses. First, as noted above, this Court has described ERISA as "reticulated," i.e., "covered with a network," "netlike," or, as the word is used in botany, "having the veins or nerves disposed like the threads of a net." *The Random House Dictionary of the English Language, Unabridged Edition* at 1244 (1973). This metaphor — a network or system of veins running through ERISA — vividly

reflects Congress' intent that all sections of the Act should hang together, should be construed as being of a piece with one another, and should be enforced by courts so as to do justice to the conception of a "reticulated" statute. To amplify and extend the Court's own metaphor, the same blood runs through the "veins" of Title IV of ERISA as through Title I. The introduction of a separate and distinct definition of "employer" into Title IV ignores the logic of internal uniformity and consistency laid down by this Court in *R.A. Gray, supra*. Petitioner submits that the "*Gray* anatomy" of the statute does not support the First Circuit's imposition of a judicially created definition of "employer" on Title IV.

The will of Congress that definitional rules in all sections of ERISA be internally uniform and consistent is further indicated by certain provisions in the text of ERISA, as amended by MPPAA, which expressly mandate that actions for the collection of withdrawal liability under Title IV be identical in structure to actions for the collection of delinquent contributions under Title I. *See* 29 U.S.C. §§ 1401(d), 1451(b); *and see* 29 U.S.C. § 1145.

The internal uniformity and consistency sought by Congress in enacting ERISA and MPPAA are also unequivocally indicated by the following remarks of the Senate sponsor of MPPAA during the Senate debate on the amendments:

> MR. MATSUNAGA. If I may pose a further question. In some recent cases such as the Washington Area Carpenters Fund Overhead Door Co. case, a simple collection action brought by plan trustees has been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise of contributions and the plan's entitlement to the contributions. Would the bill correct this situation?

MR. WILLIAMS. I feel that it would correct the situation. It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises.

Further, plan participants for whom the employer promises to make pension contribuitons to the plan in exchange for their labor are entitled to rely on their employer's promises. The bill clarifies the law in this regard by providing a direct ERISA cause of action against a delinquent employer without regard to extraneous claims or defenses.

MR. MATSUNAGA. The Senator, of course, will agree that the provisions for employer withdrawal liability are central to this legislation. Will these same principles apply to claims by a plan for withdrawal liability?

MR. WILLIAMS. Affirmative. Like suits to collect delinquent contributions, it is intended that a plan's claim for withdrawal liability not be subject to extraneous claims and defenses.

126 *Cong. Rec.* 20,180 (1980).

Similarly, in the House the following was stated during the debate on MPPAA:

> Cases such as . . . *Washington Area Carpenters Welfare Fund et al.* v. *Overhead Door Co.*, C.A. No. 79-0097, USDC D.C., April 22, 1980, are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action [for contributions] to a plan against a delinquent employer.

These same principles apply to a plan's claim for employer withdrawal liability.

126 *Cong. Rec.* 23,039 (1980) (emphasis added).

These references from the legislative history indicate that Congress sought, in MPPAA, to express a national policy indistinguishable from that in ERISA as enacted in 1974, and further indicates a congressional intent that causes of action under ERISA, as amended by MPPAA, be simple and direct. Despite such clear congressional admonitions, the First Circuit's holding herein introduces into withdrawal liability actions the very note of "ambiguity" which Congress sought to avoid in enacting MPPAA.

Moreover, while the First Circuit gave great weight to the "admonition" at § 1002 that the definitions therein are "for purposes of this subchapter", *see* pages 5a-6a *infra*, 828 F.2d at 880, the legislative history of ERISA on this point indicates a different result, justifying the invocation of the Court's *certiorari* jurisdiction to determine the issue. In this regard, as earlier noted by Justice Stewart, the fact that the definitions at 29 U.S.C. § 1002 are made applicable only "for purposes of this subchapter," and do not express applicability to Title IV [Subchapter III], appears to be nothing more than legislative inadvertence in draftsmanship. *See Nachman Corp.* v. *PBGC*, 446 U.S. at 386 n.5 (Steward, J., dissenting). Specifically, Justice Stewart has stated the following:

> In the bill that passed the House and was sent to the Conference Committee, the minimum vesting provisions and the termination insurance provisions were located under one Title. The definition of "nonforfeitable" now contained in § 1002(19) was made applicable to that entire Title. The Conference Com-

> mittee split the minimum vesting provisions and the termination insurance provision into two separate titles. As the definitional section had always been situated at the front of the minimum vesting provisions, it naturally followed those provisions into Title I ["Subchapter I"] of the bill as enacted into law. It would severely strain credulity to infer from these events that Congress decided to leave to pure chance the proper definition of "nonforfeitable" for purposes of Title IV. "Nonforfeitable" is used in Title I as a term of art. Congress used the same word in critical portions of the Title IV. Had it intended "nonforfeitable" to carry one meaning in Title I and another in Title IV Congress would presumably have said so, particularly since the two Titles were considered and enacted in tandem and were meant to function as an interrelated system of protection. Title IV, however, sets out no separate definition of "nonforfeitable," even though that Title does contain a few definitions of its own. Furthermore, the Act's legislative history reveals no suggestion that the word's import should differ as between Title I and Title IV [citations omitted].

Finally, as noted *supra*, ERISA was intended by Congress to be "uniform" in a second sense, *i.e.*, it was meant to "establish pension plan regulation as exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). This congressional intent to establish a uniform federal system of rights and liabilities is emphasized by the broad federal pre-emption clause at 29 U.S.C. § 1144(a) which applies to *both* Title I and Title IV and which provides as follows:

> **(a) Supersedure; effective date**
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter

> III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a).[6]

Guidance has been provided by the Court as to the extent of this pre-emption. As the Court has observed, "ERISA's authors clearly meant to preclude the states from avoiding through form the substance of the pre-emption provision." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. at 525. Indeed, "the express pre-emption provisions of ERISA are deliberately expansive." *Pilot Life Insurance Co.* v. *Dedeaux,* U.S. , 107 S.Ct. 1549, 1552 (1987). Further, as noted in *Cowan* v. *Keystone Profit Sharing Fund,* 586 F.2d 888 (1st Cir. 1978), "the reference to state laws in § 1144 is not limited to statutory law." *Id.* at 890. Thus, under § 1144(c), state law is defined so as to include all "decisions" as well as other forms of state action "having the effect of law," *id.*, making it "clear that

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[6] 29 U.S.C. § 1144(b) (1) and (2) describe the two narrow instances in which state law doctrines are *not* pre-empted:

> **(b) Construction and application**
>
> (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.
>
> (2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

It is clear that common law doctrines regarding the "piercing of the corporate veil" and individual shareholder and officer liability are not within the ambit of state laws regulating "insurance, banking, or securities."

under § 1144 state common law decisions" are pre-empted to the extent that they "relate to" employee benefit plans as described in 29 U.S.C. § 1144(a). *See id.* at 891. *See also PBGC* v. *Ouimet Corp.*, 711 F.2d 1085 (1st Cir.), *cert. denied*, 464 U.S. 961 (1983).[7]

Despite all of the authority cited *supra*, the First Circuit's reference in this case to "traditional common law principles" of corporation law regarding "veil-piercing" can mean nothing other than an injection of state common law into the ERISA regulatory framework. *See* page 4a *infra*, 828 F.2d at 880. Indeed, the necessity of reference to state law for "veil-piercing" standards has been conceded by the First Circuit when it observed in an earlier decision that "there is no litmus test in

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[7] The First Circuit in *Ouimet* accurately reflected the broad remedial purpose of ERISA, and the intent of Congress to oust state common law doctrines and thereby "occupy the field" of pension regulation, when it described the "controlled group" basis for withdrawal liability in a single-employer plan under Title IV:

> Avon's corporate veil was, in effect, pierced by Congress when it enacted the termination liability provisions of ERISA. The corporate form is a creation of state law and states may impose stringent limitations on attempts to disregard it; the factors courts consider in deciding whether to grant subsantive consolidations reflect such limitations. These limitations, however, do not constrict a federal statute regulating interstate commerce for the purpose of effectuating certain social policies. *See Sebastopol Meat Co.* v. *Secretary of Agriculture*, 440 F.2d 983, 985 (9th Cir. 1972) (state limitations on the "alter ego" doctrine need not be accepted in an agency's application of federal regulatory statutes); *Corn Products Refining Co.* v. *Benson*, 232 F.2d 554, 565 (2d Cir. 1956) (existence of separate corporate entity may be disregarded when necessary to further the purpose of a federal regulatory statute). Thus, concerns for corporate separateness are secondary to what we view as the mandate of ERISA in this case.

711 F.2d at 1093.

the federal courts governing when to disregard corporate form." *Alman* v. *Danin*, 801 F.2d 1, 4 (1st Cir. 1986).[8]

One of the difficulties caused by reference to state law to determine the personal liability of a shareholder or officer is that the common law doctrine of "veil-piercing" differs, sometimes subtly, sometimes significantly, from state to state. A brief comparison of "veil-piercing" rules in Connecticut[9] and Massachusetts illustrates the result of the First Circuit's logic in this case.

In Massachusetts, the rule is that the corporate entity or form may be disregarded, and a shareholder or officer held personally liable for corporate obligations, only when such disregard is necessary to thwart a criminal or fraudulent purpose, *i.e.*, where the business was incorporated for the purpose of fraudulently evading the obligation in question. *See My Bread Baking Co.* v. *Cumberland Farms, Inc.*, 353 Mass. 614, 233 N.E.2d 748 (1968); *Rice* v. *Price*, 340 Mass. 502, 164 N.E.2d 891 (1960). The Connecticut rule, in contrast, focuses not on the fraudulent purpose of the shareholders or officers at the time of incorporation, but rather considers their fraudulent intent only at the time of the particular transaction

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[8] The invitation to district courts to import state common law doctrines into ERISA actions has already been accepted by the district court for the District of Columbia. *See Connors* v. *Marontha Coal Co., Inc.*, 8 EBC 2586 (D. DC 1987), where the court held as follows:

> The law of "veil-piercing" determines the legal identity of the ERISA employer. . . . This does not mean that state law, as distinguished from federal common law, fails to govern the question of when "veil-piercing" is appropriate.

8 EBC at 2589 (footnotes omitted).

[9] Connecticut, although in the Second Circuit, is a state whose "veil-piercing" rules are made directly applicable to the Petitioner by the First Circuit's holding in this case, since Petitioner is a pension fund receiving contributions from covered employers in that state as well as the other New England states.

from which the cause of action arose. *See Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 447 A.2d 406 (1982).

Thus, the Petitioner, to hold shareholders and officers liable for withdrawal liability in Connecticut, need only establish the elements of common law fraud at the time the corporate employer withdraws from the fund, while in Massachusetts it appears Petitioner will have to establish common law fraud at the time of the corporate employer's incorporation.[10]

Conclusion.

In sum, Petitioner respectfully urges that *certiorari* be granted to resolve a conflict between a district court and two courts of appeal on a question of critical importance in the implementation of a comprehensive federal statutory scheme. If the Petitioner is correct in urging that the decision of the First Circuit was in error, the case should be remanded to the district court for further disposition, including a full develop-

[10] The difficulty of proof on such a theory is at least suggested by noting that Graf Bros. was incorporated in 1951, twenty-nine years prior to enactment of the withdrawal liability provisions of MPPAA.

ment of the facts pertaining to the "economic reality" test as described in *Donovan* v. *Agnew*, 712 F.2d 1508 (1st Cir. 1983).

Respectfully submitted,

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December 17, 1987

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Appendix A.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 87-1198

HELEN DEBRECENI, ETC.,
PLAINTIFF, APPELLANT,
v.
GRAF BROS. LEASING, INC., ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered: September 18, 1987

This cause same on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
Francis P. Scigliano, Clerk.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 87-1198

HELEN DEBRECENI, ETC.,
PLAINTIFF, APPELLANT,
v.
GRAF BROTHERS LEASING, INC., ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. A. David Mazzone, *U.S. District Judge*]

Before
Bownes, Torruella and Selya,
Circuit Judges.

James T. Grady with whom *Gabriel O. Dumont, Jr.*, and *Grady, Dumont & Dwyer* were on brief for appellant.

Michael B. Roitman with whom *Jennifer W. Catlin* and *Fine & Ambrogne* were on brief for appellees.

Robert D. City and *Robert J. Owens Associates, P.C.* on brief for Arthur W. Heidke & Sons, Inc., Amicus Curiae.

September 18, 1987

TORRUELLA, *Circuit Judge*. This case presents the question whether a corporate shareholder or officer may be held personally liable for the withdrawal liability mandated by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1381 *et seq.*, by the application of

an "economic reality" test similar to that used in cases decided under the Fair Labor Standards Act, 29 U.S.C. § 206, *see Donovan* v. *Agnew*, 712 F.2d 1509 (1st Cir. 1983), or whether the standard should be the more stringent test generally required to "pierce the corporate veil." *See, e.g., Alman* v. *Danin*, 801 F.2d 1 (1st Cir. 1986). We conclude that under the general purposes of the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA") individual liability for corporate withdrawal liability should be governed by general principles of corporate law. *Accord Connors* v. *P & M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986).

Background

Graf Brothers Leasing, Inc. ("Graf Brothers") was a trucking business incorporated in 1951 by F. William Graf ("Graf") and his brother. Graf held 80% of the stock in Graf Brothers beginning in 1965 and became the sole owner in March 1981. The company made money through the '70s, but business deteriorated toward the end of the decade, so that by 1981 the company was in serious financial straits. By then Graf Brothers owed hundreds of thousands of dollars to the New England Teamsters and Trucking Industry Pension Fund, to which it had been a contributor on behalf of its truck drivers since 1970.

From at least 1979 forward Graf was in day-to-day control of the corporation, deciding what debts to pay and attempting to keep the company going. In October 1981 he sought protection for Graf Brothers under Chapter 11 of the Bankruptcy Code and then operated Graf Brothers as a debtor in possession. His attempts to save the company failed, however, and the company ceased operations on December 31, 1981, thereby withdrawing from the Pension Fund. The Pension Fund then assessed a withdrawal liability of over $1 million, of which

only $175,000 was recovered when Graf Brothers entered into a Chapter 7 liquidation.

The Pension Fund then brought this action seeking, *inter alia*, to recover the balance of the withdrawal liability from Graf personally. The Fund stipulated that it could not adduce facts which would warrant piercing the corporate veil, but rather attempting to recover on a theory of broader liability. The District Court for the District of Massachusetts granted summary judgment for Graf, holding that "an individual may be held personally liable for a corporation's withdrawal payments [only] if the circumstances require piercing the corporate veil under traditional common law purposes." *DeBreceni* v. *Graf Brothers Leasing*, No. 85-3386, slip op. at 9 (D. Mass., January 23, 1987).

Discussion

This case turns on the definition of "employer" under Title IV of ERISA, which governs withdrawal liability. *See* 29 U.S.C. § 1381 *et seq*. If Graf is an "employer" then he is jointly liable with Graf Brothers for the withdrawal payments. The trustee of the Pension Fund stipulates that she does not allege that Graf Brothers Leasing was Graf's alter ego under a common law piercing-the-corporate-veil theory. To recover on that theory she would have to prove: "the small respect paid by the shareholders themselves to [Graf Brothers] separate corporate identity; the fraudulent intent of the incorporators; and the degree of injustice that would be visited on the litigants by recognizing the corporate identity." *Alman* v. *Danin*, 801 F.2d at 4. She contends, rather, that Graf is an employer under the "economic reality test" applied in cases decided under the FLSA, which would permit personal liability solely because

Graf maintained "virtually complete control of the day to day operations of Graf Bros." Appellants Brief at 19.

We begin with the observation that the principle of limited liability is a cornerstone of corporate law. 13A Fletcher, *Cyclopedia Corporations*, § 6213 at 16-18 (1984). Limited liability allows individuals to take a calculated risk when they engage in the investment and entrepreneurial ventures central to a capitalist economy. If the venture fails, corporate shareholders lose only their interest in the corporation, not their homes or life savings. Of course, the principle of limited liability has itself been limited by the common law doctrine which permits the piercing of the corporate veil and by statutory exception, *see, e.g.*, 26 U.S.C. §§ 7512, 7215 (making the person "required to collect, account for and pay over any tax" liable for nonpayment), but we have here neither an explicit statutory exception nor an allegation that the corporate form was ignored.

We have instead a statute that, on its face, does nothing to alter the principle of limited liability, but that appellant urges us should nevertheless be read to do so. The Fund's case for extending "employer" liability to controlling shareholders and officers proceeds along two tracks. The first, which we leave aside for now, is that extending liability promotes the goals of the MPPAA and that we should assist those goals through an act of interpretation. The second is that Congress actually extended liability, or at least meant to, when enacting the MPPAA.

This Congressional intention argument has two steps. The trustee argues first, that the definition of employer in subchapter I of ERISA, which governs ongoing pension contributions, sweeps controlling officers and shareholders like Graf into its net; and second, that the MPPAA made the subchapter I definition applicable to the withdrawal liability provisions in subchapter III of ERISA, notwithstanding subchapter I's admoni-

tion that its definitions are "for purposes of this subchapter," 29 U.S.C. § 1002. Our examination of the MPPAA, however, does not reveal an intent to apply the subchapter I definition of "employer" to subchapter III.

The MPPAA amended both subchapter I and subchapter III of ERISA. The MPPAA used the word "employer" in amending both subchapters, without defining the word and without making any reference to the subchapter I definition of employer. From this silence the trustee urges that we find an intention that the word "employer" mean the same thing each time it is used in the MPPAA, and that the meaning should be the ERISA subchapter I meaning. It is clear, however, that the silence was intended to leave the word "employer" alone, allowing it to take its meaning from the statute that is being amended — ERISA. And ERISA, for whatever reason, defines the word "employer" only for subchapter I.[1] Defining its meaning for subchapter III is up to the courts. *Cf. Robinson* v. *C.I.R.*, 805 F.2d 38, 40 (1st Cir. 1986).[2]

This conclusion brings us back to what the Trustee is really asking us to do: to define the word "employer" to include controlling shareholders and officers. We decline, for the following reasons.

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[1] In *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 370 n.14 (1980), the Supreme Court noted that Congress made some Title I (subchapter I in the Code) definitions applicable to Title IV (part of subchapter III in the Code), *see, e.g.*, 29 U.S.C. § 1321(a)(1). "This specific incorporation suggests that Title I definitions do not apply elsewhere in the Act of their own force. . . ." *Id.*

[2] We do not reach the question whether the subchapter I definition includes controlling officers or shareholders, a question which has occasioned considerable litigation, and difference of opinion. *Compare, e.g., Solomon* v. *Klein*, 770 F.2d 352, 354 (3d Cir. 1985) (controlling shareholder and officer not an "employer") *with, e.g., Mass. State Carpenters Pension Fund* v. *Atlantic Diving Co., Inc.*, 635 F. Supp. 9, 13-14 (D. Mass. 1984) (controlling shareholder or officer may be "employer"). We reserve this question for a case in which it makes a difference in the outcome.

First, as mentioned before, the principle of limited liability for corporate debts is longstanding enough and important enough to be considered a background norm, against which Congress may act of course, but which is controlling in the absence of such action. *See Connors* v. *P & M Coal Co.*, 801 F.2d at 1376. In deciding whether Congress has acted to expand liability "federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form. . . ." *Town of Brookline* v. *Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981) (citations omitted). The MPPAA does not on its face indicate any intention to treat corporate debts for withdrawal liability different from any other corporate debts. The way that one could have expected Congress to make such an intention felt was through a definition of the word "employer." Yet Congress did not define the word in the MPPAA. Nor did Congress provide an applicable definition in ERISA.

Furthermore, the purposes of the MPPAA, as described in the legislative history of that act, would not be served by an extension of personal liability for corporate withdrawal payments. The Act represents a balance between efforts to protect existing pension plan beneficiaries through a short term strategy of imposing burdens on current employer contributors and through a long term strategy of encouraging new employers to contribute to multi-employer pension funds. *See* H.R. No. 96-869, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News at 2919-20, 2935. Imposing personal liability for withdrawal payments would hurt that long term strategy by discouraging controlling individuals from directing their corporations to participate in multi-employer pension funds.

Withdrawal liability under the MPPAA is quite different than payroll taxes under the Social Security Act and minimum wage payments under the Fair Labor Standards Act, two corpo-

rate debts for which controlling shareholders and officers can be held liable. *See Donovan* v. *Agnew*, 712 F.2d at 1511; *United States* v. *McMullen*, 516 F.2d 917, 920 (7th Cir. 1975) (26 U.S.C. § 7512 imposes liability for payroll taxes on person with control over corporations affairs). Payroll taxes and minimum wage payments are liabilities which a corporation can choose to pay or not pay. A decision to forgo paying payroll taxes or wages is a conscious decision to prefer some creditors over the government or the corporation's employees. Corporations do not have the same control over withdrawal liability payments, especially in the context in which shareholder and officer liability is most likely to be relevant: bankruptcy. Withdrawal liability is not assessed until an employer "withdraws" from the pension plan, by ceasing to do business for instance. If the liabilities of the employer corporation exceed its assets, which is the likely condition when a pension fund seeks to recover against officers or shareholders personally, the corporation will enter into bankruptcy proceedings, thereby losing control over which creditors receive payments.

Given the control corporations have over payroll taxes and wages, personal liability for those debts should rarely have actually assessed. The *threat* of personal liability should be enough to induce the individuals who control corporations to prefer the IRS and employee creditors over other creditors in times of financial difficulty. If not, the individuals controlling the corporation accept a known risk. Personal liability for withdrawal payments, on the other hand, cannot be similarly avoided. This personal liability may well force corporations to more extreme efforts to avoid bankruptcy, but any benefit is likely to be marginal, since controlling shareholders can be expected to attempt to avoid bankruptcy generally, in the hope of obtaining some return on their investment. Rather than a rarely exercised threat that induces a desired behavior, personal liability for withdrawal payments would be a routine accom-

paniment to corporate bankruptcy proceedings. This personal liability would discourage controlling shareholders and officers from directing their corporations to contribute to multi-employer pension plans, thereby making it less likely that their employees will receive pension benefits. In the long run, personal liability would hurt even those employees who are already beneficiaries of multi-employer pension plans, because the vitality of those plans depends on new employers contributing to them. *See* House Report, 1980 U.S. Code Cong. & Admin. News at 2919-20, 2935.

The decision of the district court is *affirmed*.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HELEN DEBRECENI,
PLAINTIFF

Civil Action
85-3386-MA

vs.

GRAF BROTHERS LEASING, INC., ET AL.,
DEFENDANTS

OPINION

Mazzone, D.J. January 23, 1987

This is an action for collection of withdrawal liability under the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.*, which amended the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. This case was previously before the Court on the defendants' motion for summary judgment, which was denied by memorandum and order on April 2, 1986. On May 19, 1986, this Court also denied the defendants' motion to dismiss or strike Count III of the plaintiff's amended complaint. A stipulation of dismissal as to two original defendants, Graf Brothers Leasing, Inc. and Downeast Dispatch, Inc., was filed on October 10, 1986.

In the claim remaining in this action, the plaintiff, Fund Manager of the New England Teamsters and Trucking Industry Pension Fund ("Pension Fund"), seeks a determination by the Court that F. William Graf is an "employer" within the meaning of 29 U.S.C. §§ 1002(5) and 1381, and judgment against him for the withdrawal liability and interest that plaintiff claims is due the Pension Fund as a result of the cessation of operations of

Graf Bros., Inc. on December 31, 1981. The plaintiff asks this Court to apply an "economic reality" test to hold the defendant personally liable for the withdrawal payments, while the defendant urges the Court to accept the position that F. William Graf is not personally liable for the withdrawal payments, absent facts sufficient to "pierce the corporate veil."

This case was tried before the Court on January 15, 1987. The evidence consists of a 12-page stipulation of the parties,[1] the deposition testimony of H. Terence Lyons, a financial advisor, and Peter L. Murray, an attorney who had previously represented F. William Graf, the prior testimony of F. William Graf in bankruptcy proceedings involving Graf Bros., Inc.,[2] the in-court testimony of Daniel A. Graf, nephew of F. William Graf, and various exhibits submitted by the parties. At the trial of this case, the parties agreed that any determination of damages would await the Court's resolution of the issue of liability. The factual background of this case, following a review of the parties' very capably drafted stipulation and trial briefs, as well as the depositions, in-court testimony, and exhibits may be summarized as follows.

I.

In 1951, a partnership of brothers Henry Graf, Jr. and F. William Graf was incorporated as Graf Bros., Inc. The company, an over-the-road trucking business, was incorporated in Massachusetts and had its principal place of business in Salisbury, Massachusetts. After the death of Henry Graf, Jr. in

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[1]This stipulation was amended in court to include paragraph 11 of the plaintiff's second amended complaint.

[2]F. William Graf was unable to testify in this case because of his deteriorated medical condition.

1965, F. William Graf became the majority stockholder of Graf Bros., Inc. Henry Graf III and Daniel A. Graf, the sons of Henry Graf, Jr., were at times given shares of Graf Bros., Inc., but at all times F. William Graf owned over eighty percent of the company's outstanding stock.[3]

The company continued to grow, and through the early 1970s, Graf Bros., Inc. made a profit. In four of the six years from 1974 to 1979, however, Graf Bros., Inc. lost money and began to experience increasingly severe cash-flow problems. In May 1980, Graf Bros., Inc. negotiated a wage loan agreement with its employees which effectively provided for a seven percent reduction in the wages of its employees. The company reported a loss of $326,143 for the year 1980.

From prior to 1970 through December 31, 1981, Graf Bros., Inc. was obligated to make monthly contributions to the Pension Fund pursuant to collective bargaining agreements with six teamster union locals. On a number of occasions during this period, F. William Graf executed these collective bargaining agreements on behalf of Graf Bros., Inc., and also executed the Pension Fund's Agreement and Declaration of Trust, as well as standard participation agreements on behalf of the company.

Graf Bros., Inc. eventually became delinquent for $290,000 in federal withholding taxes and $95,000 in state withholding taxes, and became the subject of pressure from the Internal Revenue Service to pay the delinquent taxes. On March 11, 1981, a series of transactions involving Graf Bros., Inc. occurred. Daniel A. Graf contributed his shares of Graf Bros., Inc. to the capital of the company and resigned as Vice President and a director of Graf Bros., Inc., making F. William Graf the sole shareholder of Graf Bros., Inc. F. William Graf ap-

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[3]Henry Graf III died in 1978, leaving the company to be run by F. William Graf and Daniel A. Graf.

pointed himself sole director as well as President and Treasurer of Graf Bros., Inc. and gifted his stock in another company, Downeast Dispatch, Inc. to Daniel A. Graf, making Daniel the sole owner of that company.[4] On that same date, F. William Graf caused Graf Realty, Inc., another company of which he was President and majority stockholder, to transfer to Graf Bros., Inc. a parcel of improved land in South Portland, Maine which was subsequently mortgaged by Graf Bros., Inc. for $130,000. F. William Graf also personally loaned $61,000 to Graf Bros., Inc., and this infusion of cash from the $130,000 mortgage and $61,000 personal loan was then used to pay off a portion of the company's delinquent withholding tax liability.

Graf Bros., Inc. nevertheless continued to have cash flow problems and, during the 1981 calendar year, was often late in making its monthly contributions to the Pension Fund. On October 15, 1981, the Pension Fund commenced a civil action against Graf Bros., Inc. in the Superior Court of Massachusetts, seeking judgment against the company for approximately $65,000 in delinquent contributions and other damages.

On October 28, 1981, F. William Graf, as sole shareholder and Director of Graf Bros., Inc., authorized himself to file a Chapter 11 bankruptcy petition. In December, 1981, Graf Bros., Inc. was unable to pay the insurance premiums for its trucks to operate in 1982 and the insurance was cancelled. Graf Bros., Inc. ceased operations on December 31, 1981 and withdrew from the Pension fund within the meaning of 29 U.S.C. §§ 1381 and 1383. Following the withdrawal of Graf Bros., Inc. from the Pension Fund, the Fund determined the company's withdrawal liability to be $1,319,949, and notified Graf Bros., Inc. of this liability by filing a proof of claim in the company's Chapter 11 proceedings.

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[4]Prior to this transfer, F. William Graf and Daniel A. Graf had each owned 50% of the only class of Downeast Dispatch, Inc. stock.

The Chapter 11 reorganization proceedings were converted to a Chapter 7 liquidation on March 22, 1981. The company's assets in buildings, vehicles and equipment were liquidated, and many of the creditors received full payment for their claims. Following negotiations between the trustee of the bankruptcy estate and the Pension Fund, the Pension Fund agreed to accept $137,429.85 as full payment on its delinquent contribution claim in that amount, and $175,000 from the Graf Bros., Inc. bankruptcy estate with respect to the withdrawal liability. F. William Graf received nothing from the liquidation of Graf Bros., Inc.

The deposition testimony of Mr. Lyons and Mr. Murray indicates that during the period of late 1979 through December 1981, F. William Graf ran the day-to-day operations of Graf Bros., Inc., was in charge of all of the financial affairs of the company, and was aware of the poor financial condition of Graf Bros., Inc. Mr. Lyons' deposition also indicates that, at times, F. William Graf would make a "lot of noise" about selling Graf Bros., Inc., but would then set "conditions" that would make a sale "impossible." Lyons Deposition, p. 47. Daniel Graf also testified in court that, from 1979 to 1981, F. William Graf came to work on a daily basis, dealt with union matters with respect to Graf Bros., Inc., and made important financial decisions with respect to the company's operations. In addition, Mr. Graf testified that during 1979 to 1981 there were unsuccessful discussions concerning the possible sale or merger of Graf Bros., Inc.

The parties to this case have stipulated that there is no evidence of fraudulent inter-company transfers and no evidence that funds were fraudulently diverted from Graf Bros., Inc. to any company or individual. The plaintiff also presents no evidence that Graf Bros., Inc. operated as a sham corporation, or as an "alter ego" corporation, for the purpose of defrauding creditors. Furthermore, the parties have stipulated that there

is no evidence that F. William Graf acted with fraudulent intent with respect to the Pension Fund. The parties have also stipulated that the plaintiff does not allege a common law theory of piercing the corporate veil.

II.

As there is no dispute between the parties with respect to the factual background of this case, the issue squarely presented to this court is whether F. William Graf is to be considered an "employer" within the meaning of 29 U.S.C. §§ 1002(5) and 1381 and therefore to be held personally liable for the withdrawal payments.

Under the facts of this case, the plaintiff submits that F. William Graf is an "employer" liable for the withdrawal payments at issue as a matter of "economic reality." In support of this position, the plaintiff cites *Donovan* v. *Agnew*, 712 F.2d 1508 (1st Cir. 1983), a Fair Labor Standards Act case involving unpaid wages in which the First Circuit applied an "economic reality" test and found that personal liability could properly be imposed on

> corporate officers with a significant ownership interest who had operational control of significant aspects of the corporation's day to day functions, including compensation of employees, and who personally made decisions to continue operations despite financial adversity during the period of nonpayment. 712 F.2d at 1514.

The plaintiff also notes the opinion of this Court in *Alman* v. *Servall Manufacturing Co. and Herman Bank*, C.A. No.

82-0746-MA (D. Mass., April 9, 1984), in which the Court relied upon the *Agnew* holding to impose liability for delinquent fund payments upon a corporate officer and majority shareholder who had control of all financial operations, and who acted on behalf of his corporation in all matters having to do with benefit plans.

The plaintiff, in light of these cases, argues that evidence that F. William Graf was a corporate officer of Graf Bros., Inc. with a significant ownership interest, that he had control of significant aspects of the corporation's day-to-day functions amounting to operational control, that he specifically acted on behalf of the corporation with respect to the Pension Fund, and that he personally made the decision to continue operations despite financial adversity during a period of nonpayment of contributions, is sufficient proof under an "economic reality" analysis to hold F. William Graf accountable for the withdrawal liability.

The plaintiff's reasoning, however, is flawed in one fundamental respect: it fails to recognize the distinction between current/delinquent pension fund contributions and withdrawal liability. Current pension contributions are payments to the pension fund which are negotiated as part of collective bargaining and are a contractual obligation of the employer similar to wages or other fringe benefits. *See* 29 U.S.C. § 1332(a)(3)(B)(ii). A strong public policy, requiring employers to pay their employees their wages and benefits, is expressed in the imposition of criminal sanctions and personal liability for nonpayment of wages and benefits.[5]

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[5]For instance, in Massachusetts, a president of a company who fails to pay his employees their wages and benefits may be subject to criminal prosecution. Mass. Gen. Laws c. 151, § 19 and c. 149, § 148. The Federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, provides for personal liability for an employer's non-payment of wages or failure to pay minimum wage. 29 U.S.C. § 216.

Withdrawal liability, on the other hand, occurs only after a company has ceased operations and withdrawn from the pension fund, 29 U.S.C. § 1381(a), and the public policy rationale supporting criminal and personal liability for ongoing pension contributions is lacking in the withdrawal liability context. At the time of withdrawal liability, the payments by the company may be beyond the control of the employer. As the defendant notes, this may be especially true in the bankruptcy context.

Furthermore, this Court agrees with the findings of the District of Columbia Court of Appeals in *Connors* v. *P&M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986), another case involving the issue of personal liability of an employer for withdrawal liability, that there is nothing in the language or purpose of the MPPAA to permit such a broad interpretation of "employer" as to accommodate an "economic reality" test in the withdrawal liability context. 801 F.2d at 1377. The Court in *P&M Coal* observed that the MPPAA did not expressly define the "employer" who is liable for corporate withdrawal obligations, nor were corporate officers and shareholders included in the list of "persons" who were "employers" under the Title I definitions contained in 29 U.S.C. §§ 1002(5) and 1002(9). The Court held that something more than a mere "expansive interpretation" of the Title I definition of "employer" is necessary to indicate that Congress intended to alter the fundamental principle of limited corporate liability by including owner-officers acting within the legitimate scope of their corporate responsibilities as "employers" under Title IV. *Id.* at 1376.

The plaintiff, though, maintains that the applicability of an "economic reality" test is readily apparent from the history of the MPPAA, and quotes the statement of Representative Thompson, House Sponsor of the MPPAA, that

> . . .We intend that the term "employer" be construed in a manner consistent with the bill and its purposes.

> We intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form of control, or through transactions which are less than bona fide and arms length. 126 Cong. Rec. 17, 2308 (1980).

This Court, however, finds that this statement would not be inconsistent with an application of the common law principles of piercing the corporate veil urged by the defendant, and despite the inapplicability of an "economic reality" test, this Court holds that an individual may be held personally liable for a corporation's withdrawal payments if the circumstances require piercing the corporate veil under traditional common law principles.

Under the circumstances of this case, there is no indication that any "fraud or injustice" would be visited by the recognition of the corporate entity, *Taylor* v. *Standard Gas Co.*, 306 U.S. 307, 322 (1939), nor is there evidence that there was "small respect paid by the shareholders" to the separate corporate identity of Graf Bros., Inc., or any "fraudulent intent of the incorporators." See *Alman* v. *Danin*, 801 F.2d 1 (1st Cir. 1986). The parties have stipulated that there is no evidence that Graf Bros., Inc. operated as a sham or "alter ego" corporation for the purpose of defrauding creditors, and that F. William Graf did not act with fraudulent intent or personally profit at the expense of the Pension Fund. The plaintiff has conceded through stipulation that it is not alleging a common law theory of piercing the corporate veil.

The Court therefore concludes that there is no basis upon which to hold F. William Graf personally liable for the with-

drawal liability of Graf Bros., Inc. and judgment is entered for the defendant.

SO ORDERED.

A. David Mazzone
United States District Judge

United States District Court
DISTRICT OF MASSACHUSETTS

HELEN DEBRECENI,
PLAINTIFF
v.
GRAF BROTHERS LEASING, INC., ET AL.,
DEFENDANTS

Judgment in a Civil Case

Case Number: CA 85-3386-MA

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

in accordance with the Stipulation of Dismissal filed on October 10, 1986 and the Court's Opinion dated January 23, 1987 that the above entitled action be and hereby is dismissed as to the defendants, Graf Brothers Leasing, Inc. and Downeast Dispatch, Inc., and it is further ORDERED judgment for the defendant F. William Graf.

January 26, 1987

George F. M.Grath
Clerk
Helen M. Costello
(By) Deputy Clerk

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action 85-3386-MA

HELEN DEBRECENI, FUND MANAGER,
PLAINTIFF

VS.

GRAF BROS. LEASING, INC., ET AL.,
DEFENDANTS

MEMORANDUM AND ORDER

Mazzone, D.J. April 2, 1986

This is an action to collect withdrawal liability under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §§ 1381-1461 (1982). Plaintiff, Helen Debreceni, is the manager of the New England Teamsters and Trucking Industry Pension Fund (Fund), a multi-employer pension plan governed by ERISA and the MPPAA. Graf Bros., Inc. (Graf Bros.), a participating employer, withdrew from the Fund in December, 1981, as that term is defined in ERISA, 29 U.S.C. § 1383(a). Defendants are F. William Graf, the sole shareholder of Graf Bros., and two corporations, Graf Bros. Leasing and Downeast Dispatch, Inc. Defendants, the Fund alleges, are liable to it for the unpaid withdrawal liability assessed against Graf Bros. Defendants have moved for summary judgment. For the reasons stated below, defendants' motion is denied.

I.

Graf Bros., an over-the-road trucking business, was incorporated in Maine in 1953. Pursuant to a collective bargaining agreement, Graf Bros. contributed to the Fund. In December, 1981, Graf Bros., involved in bankruptcy proceedings, withdrew from the Fund. The Fund's trustees determined that Graf Bros. incurred withdrawal liability in the amount of $1,219,949. Graf Bros.' trustee in bankruptcy settled the Fund's withdrawal liability claim for $175,000. The Fund sued F. William Graf and the defendant corporations in an attempt to collect the balance.

F. William Graf was the sole shareholder of Graf Bros. when it withdrew from the Fund. The Fund also asserts that Graf was an officer but which corporate office he held, if any, is not specified.

Graf Bros. Leasing (Leasing) was incorporated in New Hampshire in May, 1976. From offices in Massachusetts, Leasing conducted a storage trailer leasing business. When Graf Bros. withdrew from the Fund in December, 1981, Leasing was owned by F. William Graf, and his nephew, Daniel Graf, each of whom owned 100 of the corporation's 200 shares of outstanding stock.

Downeast Dispatch, Inc. (Downeast) was incorporated in Maine in October, 1979, and operated an over-the-road trucking business. In December, 1981, its sole shareholder was Daniel Graf.

Stock ownership in the three corporations had been recently shuffled. Before March 11, 1981, F. William and Daniel Graf each owned shares of stock in each of the three corporations. Together, the two owned Leasing and Downeast, each holding fifty percent of the outstanding shares. The two also owned Graf Bros., but William owned eighty-eight percent (408 shares) and Daniel owned twelve percent (forty-six shares).

On March 11, the Fund says, Daniel contributed his forty-six shares of Graf Bros. stock to that corporation's capital. F. William then transferred his 1000 shares of Downeast stock to Daniel. The result was that F. William became the sole shareholder of Graf Bros., Daniel became the sole shareholder of Downeast, and each of them now owned fifty percent of Leasing.

In its amended complaint, the Fund alleges that the principal purpose of the stock transfers was to insulate Leasing and Downeast from legal responsibility for Graf Bros.' withdrawal liability.

II.

The Fund contends that F. William Graf is an employer liable for withdrawal payments because he is the sole shareholder and a corporate officer of Graf Bros. 29 U.S.C. §§ 1002(5), (9). Downeast and Leasing are liable for withdrawal payments, the Fund asserts, because they and Graf Bros. were commonly controlled corporations and can be treated as a single employer. 29 U.S.C. §§ 1002 (37)(B); 1301(b).

Defendants disclaim any liability to the Fund, and have moved for summary judgment. F. William Graf says he is not liable for Graf Bros.' withdrawal liability because ERISA does not make corporate officers and shareholders personally liable for their employers' and corporations' ERISA violations. The three corporations were not, they argue, commonly controlled when Graf Bros. withdrew from the Fund.

A.

ERISA defines an employer as "any person acting directly as an employer, or indirectly in the interest of an employer,

in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). The statute also defines "person" as "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association or employee organization." 29 U.S.C. § 1002(9). Corporate officers and shareholders are, of course, not included in that list of "persons."

Corporate officers and shareholders have been held personally liable for ERISA withdrawal liability when courts have pierced the corporate veil and found them to be corporate alter egos, and their corporations "merely a facade for the operation of the dominant stockholder or stockholders." *Solomon* v. *Klein*, 770 F.2d 352, 354 (3d Cir. 1985).

But the Fund does not contend that the corporate identity of Graf Bros. was fictive, and so should be ignored. It maintains instead that F. William Graf, as the sole shareholder and a corporate officer, is liable because he acted indirectly in the interest of Graf Bros.

This Court has twice before considered whether corporate officers and shareholders are subject to liability for ERISA violations by their employers and corporation, and both times concluded they are. *Massachusetts State Carpenters Pension Fund* v. *Atlantic Diving Co.*, No. 83-2872 (D. Mass. October 12, 1984); *Alman* v. *Servall Mfg. Co.*, 82-0746 (D. Mass. April 9, 1984). I have carefully reviewed those decisions, as well as several contrary decisions in the Third Circuit. Once again, I must conclude that an individual who is a corporate officer and a dominant shareholder, may be personally liable for pension fund obligations as an "employer" under ERISA.[1]

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[1] *Alman* and *Massachusetts State Carpenters* were both actions to collect delinquent contributions, not withdrawal liability. That, however, does not

Congress' intent in enacting ERISA was to "insure that workers receive the benefits to which they are entitled under private pension plans established for them by their employers." *Pension Benefit Guaranty Corp.* v. *Quimet Corp.*, 470 F. Supp. 945, 947 (D. Mass. 1979), *aff'd*, 630 F.2d 4 (1980), *cert. denied*, 450 U.S. 914 (1981). In *Alman*, faced with interpreting what Congress meant by "employer" in ERISA, this Court turned for guidance to cases interpreting the same term as it is used in the Fair Labor Standards Act (FLSA). I am mindful of the Third Circuit's disapproval of this analysis. *Solomon* v. *Klein*, 770 F.2d at 354. But I must respectfully disagree. ERISA is an integral part of a comprehensive federal statutory scheme directed at the plight of working men and women, which also includes the National Labor Relations Act, 29 U.S.C. §§ 151-169, the Labor Management Relations Act, 42 U.S.C. §§ 301-1397(f). *See Massachusetts State Carpenters*, slip op. at 7-8. ERISA and the FLSA are particularly interrelated. Both ERISA and the FLSA share a common underlying policy; both define "employer" in nearly identical language; and, both focus on protecting employees' compensation. *Id.* at 9-10.

Nothing in the recent Third Circuit decisions convinces me that the reasoning I employed in *Alman* and *Massachusetts State Carpenters* was not apt, or the conclusions incorrect.[2] Because F. William Graf was Graf Bros.' sole shareholder (and apparently a corporate officer), it is possible that he "had control of its operations and he managed and directed all its

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affect the analysis of who can be considered an "employer" responsible for withdrawal liability. *See Central Pennsylvania Teamster's Pension Fund* v. *Service Group*, No. 84-2469 (E.D. Pa. March 28, 1985).

[2] In addition to *Solomon*, these cases are *Sheet Metal Workers* v. *Laing Sheet Metal*, No. 85-1383 (E.D. Pa. November 26, 1985); *Amalgamated Cotton Garment & Allied Industries Fund* v. *J.B.C. Co. of Madera*, 608 F. Supp. 158 (W.D. Pa. 1984); *Combs* v. *Indyk*, 554 F. Supp. 573 (W.D. Pa. 1982).

financial, production and all other business activities" and in particular "acted on behalf of [Graf Bros.] in all matters having to do with the benefit plan[s]. . ." *Alman*, slip op. at 2. If so, he would satisfy ERISA's definition of employer and could be held personally liable for Graf Bros.' withdrawal liability.

Of course, today's decision does not resolve this factual issue. The Fund must show that F. William Graf did, in fact, exert this sort of dominant control over the affairs of Graf Bros. such that he can be considered an employer as that term is defined by ERISA. Because this question is unresolved, however, and because F. William Graf could be found personally liable, summary judgment is not appropriate.

Accordingly, defendant F. William Graf's motion for summary judgment must be denied.

B.

More difficult is the liability for withdrawal payments of Leasing and Downeast. The Fund alleges that Downeast, Leasing and Graf Bros. are under common control and so should be treated as a single employer for purposes of ERISA liability.

Commonly controlled corporations are treated as one employer under ERISA and, accordingly, each member corporation is jointly and severally liable for payment of withdrawal liability. 29 U.S.C. §§ 1002(37)(B); 1301(b)(1). If a control relationship exists, Downeast and Leasing can be held liable for the withdrawal liability owed by Graf Bros. *See Connors* v. *Calvert Development Co.*, 622 F. Supp. 877, 881 (D.D.C. 1985).

Common control for purposes of ERISA is determined with reference to stock ownership regulations promulgated pursuant to section 414(c), the Internal Revenue Code. 29 U.S.C.

§ 1301(b)(1).[3] The Treasury Regulation issued under 26 U.S.C. § 414(c) defines a group "under common control" as a parent-subsidiary, brother-sister or combined group. 26 C.F.R. § 11.414(c)-2(a); The Fund alleges that Downeast, Leasing and Graf Bros. are a brother-sister group of businesses under common control.[4]

To qualify as a brother-sister commonly controlled group, five or fewer persons, in some combination, must own a controlling interest in each of the corporations, and those persons

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[3]Section 1301(b)(1) provides:

> For purposes of this subchapter [subchapter III], under regulations prescribed by the corporation [Pension Benefit Guarantee Corporation (PBGC)], all employees of the trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and co-extensive with regulations prescribed for similar purposes by the Secretary of the Treasury under § 414(c) of Title 26.

The PBGC regulation promulgated pursuant to this section, 29 C.F.R. § 2612, incorporates by reference the provisions of section 414(c) of the Internal Revenue Code of 1954 and the regulations issued thereunder. Those regulations appear at 26 C.F.R. §§ 11.401(a)-11 - 11.415(c)(4)-1.

[4]A brother-sister group of businesses under common control

> means two or more organizations conducting trades or businesses, if (i) the same five or fewer persons who are individuals . . . own . . . singly or in combination a controlling interest of each organization, and (ii) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control of each organization.

26 C.F.R. § 11.414(c)-2(c).

must also have effective control over each corporation. A "controlling interest" for purposes of the regulation is ownership of at least eighty percent of the stock of a corporation. 26 C.F.R. § 11.414(c)-2(b)(2). Persons are in "effective control" of a corporation if they "own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote. . .or more than 50 percent of the total value of shares of all classes of stock. . ." 26 C.F.R. § 11.414(c)-2(c)(2).

These regulations have been vigorously litigated. Two additional requirements have emerged from this litigation. First, each stockholder who is included in the group of five or fewer stockholders, must own at least some stock in each of the corporations supposedly under common control. Second, in determining whether the group has effective control over each corporation, each person's stock is considered only to the extent that it is owned identically in each of the corporations. For example, a person who owns eighty percent of the voting stock of one corporation and thirty percent of another would be considered as owning thirty percent of both corporations for purposes of determining effective control. *See United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *Connors* v. *Calvert Development Co.*, 622 F. Supp. at 881.

Defendants have submitted the affidavit of Daniel Graf which attests to the stock ownership of the three corporations in December, 1981, when Graf Bros. withdrew from the Fund. Applying these regulations, it is clear the three corporations are not now under common control for purposes of ERISA. Although the three corporations are owned completely by only two persons, Daniel and F. William Graf, neither owns stock in all three corporations. Downeast, owned entirely by Daniel, cannot be commonly controlled with Graf Bros. because Daniel owns no Graf Bros. stock. F. William does own all of Graf

Bros. and fifty percent of Leasing, but the same five or fewer persons must own at least eighty percent of each corporation in a group of commonly controlled corporations. Thus, neither Leasing nor Downeast is part of a control group with Graf Bros. and cannot be treated with it as a single employer.

The Fund argues, nonetheless, that defendants are not entitled to summary judgment. First, the Fund says the affidavit of Daniel Graf is not sufficient to establish the stock ownership; only the Downeast stock transfer book is reliable in deciding whether F. William Graf relinquished his stock in Downeast before Graf Bros. withdrew from the Fund. Second, the Fund contends that the March, 1981 stock transfers by which Daniel and F. William Graf became sole shareholders of Downeast and Graf Bros., respectively, fall within a statutory provision voiding transfers made to escape paying withdrawal liability. *See* 29 U.S.C. § 1392(c). Section 1392(c) provides that "[i]f the principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction."

Before the stock was shuffled in March, 1981, the three corporations would have qualified as members of a commonly controlled group and could have been treated as one employer for purposes of ERISA. Daniel and F. William each owned stock in each of the corporations, and the two together owned controlling interests in all three. Considering Daniel's stock in Leasing and Downeast only to the extent it was identical with his stock in Graf Bros. — twelve percent — Daniel and F. William still had effective control of all three corporations.

It is true that the Fund has not presented any affidavits, depositions or interrogatories supporting this assertion that the March, 1981 stock transfer was deliberately arranged to protect Downeast and Leasing from ERISA liability. On the other

hand, the affidavit of Daniel Graf does not explain the stock transfer and does not deny that it was for that purpose. His affidavit merely outlines the stock ownership in the three corporations in December, 1981. Since section 1392(c) authorizes this Court to look behind stock transactions, and because the effect of the March transfers (unintended or otherwise) was to make Leasing and Downeast no longer liable for Graf Bros.' ERISA withdrawal liability, I conclude that it is part of defendants' burden in moving for summary judgment to establish that section 1392(c) does not apply. Since they have not done so, I am unable to conclude that defendants are entitled to judgment in this matter as a matter of law.

Conclusion

Accordingly, defendants' motion for summary judgment is denied.

SO ORDERED.

A. David Mazzone
United States District Judge

Appendix D

29 UNITED STATES CODE.

§ 203. Definitions

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

. . . . . .

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as a employer) or anyone acting in the capacity of officer or agent of such labor organization.

§ 1002. Definitions

For purposes of this subchapter:

. . . . . .

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

. . . . . .

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

§ 1401. Resolution of disputes

. . . . . .

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator

issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

§ 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to

the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

(Pub. L. 93-406, Title IV, § 4301, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1263.)